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OCTOBER TERM 1963

No. 38

POLAR ICE CREAM AND CREAMERY COMPANY,

Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida.

Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division.

REPLY BRIEF FOR POLAR ICE CREAM & CREAMERY COMPANY

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REPLY BRIEF FOR POLAR ICE CREAM & CREAMERY COMPANY

STATEMENT

The Appellant, Polar Ice Cream & Creamery Company, will hereinafter in this Reply Brief sometimes be referred to as Polar. Questions presented will not be repeated, but the Argument shall be divided by topical headings.

I. FLORIDA'S SCHEME FOR THE REGULATION OF MILK IN THE PENSACOLA AREA DISCRIMINATES AGAINST AND BURDENS THE FLOW OF OUT OF STATE MILK INTO FLORIDA, IN VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

In their attempt to defend the specific portions of the Florida Milk Control Law and rules of the Florida Milk Commission, whose constitutionality under the Commerce Clause has been questioned by Appellant, Appellees direct the major part of their argument to the establishment of the proposition that "milk control laws" as such are a valid exercise of the State's police power. Thus, for example, Appellees go to some length to point out that state statutes fixing minimum milk prices have been upheld on several occasions. (Brief of Appellees, pp. 18-20) In discussing **Lehigh Valley Coop v. United States, 370 U.S. 76 (1962)**, Appellees draw much comfort from the fact that, in their view, the "case actually expresses the continued support by the Supreme Court of the United States of regulations establishing minimum producer prices." (Brief of Appellees, p. 22)[1].

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[1] Appellees also suggest that *Lehigh Valley Coop* v. *United States*, 370 U.S. 76 (1962) affords no support for Polar's contentions because it simply held that "the Federal Administrator exceeded the authority of the Congressional Act." (Brief of Appellees, p. 22) The *Lehigh* case did rest upon such a holding. But the Court held that the administrator exceeded his authority *because* the compensatory payment plan which was the subject of the controversy had the effect of "imposing almost insuperable trade restrictions on the entry of nonpool milk into a marketing area." (370 U.S., at 98) and was therefore in violation of Section 8c(5)(G) of th Agricultural Marketing Act of 1937, a provision which "was compendously intended to prevent the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers . . . . " (370 U.S., at 97) The basic issue in *Lehigh*, then, was the same as the basic issue involved in this case.

The validity of all parts of the Florida scheme of milk control, as such, is not the issue in this case. Polar recognizes that a State may, under its police power, regulate the milk industry for the purpose of assuring that its citizens have available an adequate supply of wholesome milk, but such regulations must be constitutional. What Polar does deny is that a state may, consistent with the Commerce Clause, adopt a scheme implemented by a combination of statutory provisions and administrative orders which allocates to its own producers all Class I sales up to the total amount of their deliveries, to the exclusion of producers supplying the same area but located in other states.

The issue presently before the Court, then, is whether the State of Florida may, under the guise of fixing producer prices, impose restrictions which are for the purpose and have the effect of favoring Florida producers, as opposed to producers located in other states.[2] Appellees' Brief, despite its extensive discussion of the power to regulate producer prices and the need for maintaining adequate sources of milk, never comes to grip with this simple but basic issue.

The Florida Milk Commission has established an allocation scheme which provides, in substance, that all of Polar's Class I sales, to the extent of the total deliveries made to Polar by Florida producers, shall be allocated to those producers, leaving only what, if any, remains of Class I, plus Class II, III and IV to be al-

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[2] *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346 (1939), cited by appellees, is of no relevance to this issue, since the regulation questioned in that case did not discriminate against interstate commerce in favor of local producers and processors.

located to out-of-state producers. The Commission has implemented this discriminatory scheme by its enforcement of two Sections of the Florida Milk Control Law, Sections 501.05(3) and 501.09(3)(a), which have the effect of tying Polar to its Florida producers and which thereby forestall any attempt of Polar, by reducing its purchases of milk from Florida producers, to relieve itself of the crippling burdens resulting from the Commission's discriminatory allocation scheme. The allocation plan and these two latter statutory provisions are integral parts of a single regulatory scheme. They cannot be considered apart from one another.

It cannot be denied that on its face the allocation scheme discriminates against out-of-state producers. Appellees have made no attempt to deny this fact. Their only arguments in support of the scheme seem to be (1) that Appellant has remained free to "purchase milk from every state in the union and pay whatever price his negotiations might provide" (Brief of Appellees, p. 23); (2) that Polar "was regularly purchasing milk from the identical 'base earned producers' during the years that the Florida Milk Commission exercised no control" in the Pensacola area (Brief of Appellees, pp. 23-24).

It is true that neither the Florida Milk Control Law nor the rules of the Florida Milk Commission purport, on their face, to regulate the price of, nor limit the importation of, out-of-state milk. Yet this is clearly the effect of the entire scheme. As pointed out in more detail in Appellant's principal brief (Brief for Polar Ice Cream & Creamery Company, p 23), the allocation plan, coupled with Sections 501.05(3) and 501.09(3)(a) of the Florida Milk Control Law "put legal and economic pressure upon Polar to reduce its out-of-state purchases."

The fact that Polar may in a technical sense be free to negotate any price with out-of-state producers, is no answer to Polar's contentions. As Appellees have themselves pointed out, while it costs the producers the same amount to produce each gallon of milk, the distributor's return on his sales varies with his utilization. (Brief of Appellees p. 5). Class I, or fluid, milk sells at the highest price. The distributor receives correspondingly less for Class II, III and IV uses. It is for this reason that utilization pricing has been adopted in Florida. It is only the "blend" price that gives a producer a fair return, since the price which he receives for Class I milk is well above his cost of production, and the Class II, III and IV prices are below his cost of production. (Brief of Appellees, pp. 5-6) Thus, if a producer is required to sell a disproportionate share of his milk at Class II, III and IV prices, he will not be able to secure a fair return on his sales. This is precisely the position in which the Florida allocation scheme places out-of-state producers.

Freedom to negotiate prices under these circumstances is a hollow mockery. The scheme compels the out-of-state producer to sell the bulk of its milk for utilization for which less than the blend price is customarily paid.

Conversely, under the Commission's allocation scheme and Sections 501.05(3) and 501.09(3)(a) of the Florida Milk Control Law Polar must purchase its Class I milk from Florida producers. This insures a price to Florida producers substantially higher than the "blend" price.

In order to secure a fair return, Polar must resell this milk as fluid milk for Class I usage. While Polar can purchase Class II, III and IV milk from out-of-state producers, the inexorable laws of economics make

certain that these purchases must be at considerably less than "blend" prices if Polar is to process and sell milk at a competitive price in the Pensacola market.

The Florida Milk Commission and the Florida producers understand these economic facts. The assumption underlying the entire utilization pricing scheme which Florida has adopted is that Florida producers will get more than the "blend" price, while out-of-state producers must demand less if they are to sell any of their milk in the area.

Thus the statement that Polar may purchase from out-of-state producers at whatever prices it may negotiate means virtually nothing, for the prices at which it negotiates must be within the limitations imposed by the Florida utilization pricing scheme. Since Class I milk is allocated to Florida producers, Polar can purchase milk from out-of-state producers only at Class II, III and IV prices, prices at which out-of-state producers could not profitably sell. This is in economic fact an exclusion of out-of-state producers from the market.

Nor is it relevant that Polar regularly purchased milk from the identical "base earned producers" prior to the entry of the Florida Milk Commission into the Pensacola area. Before the regulatory scheme they were paid the "blend" price, nothing more. The effect of the allocation scheme, together with Sections 501.05(3) and 501.09(3)(a), is to require Polar to continue to purchase from these same producers but to pay more than the "blend" price. Certainly, the fact that Polar purchased from these producers on its own terms prior to the entry of the Milk Commission into the Pensacola area carries no implication that it can be compelled to continue to purchase from them on terms imposed by the Commission.

The basic and inescapable fact is that the Florida regulatory scheme deliberately and effectively discriminates against out-of-state producers in favor of Florida producers. This discrimination is a direct burden on interstate commerce between Polar and its out-of-state producers, and between all other Florida processors similarly situated and their out-of-state producers.

Not a single sentence in Appellees' Brief attempts to deny the fact of this discriminatory burden.

Furthermore, the inevitable economic and practical result of the discriminatory burden will be ultimately to exclude more and more out-of-state milk from Florida. Out-of-state producers simply will not, and cannot, continue to sell at prices which Appellees admit would be below their cost of production — and less than they can obtain on the free market elsewhere. Florida processors, who are compelled to pay Class I prices for Florida-produced milk, cannot pay a fair price to out-of-state producers whose milk they must utilize primarily for Class II, III and IV usages.

Appellees thus have not only failed to deny but by clear implication have admitted, that the Florida scheme imposes a discriminatory burden on interstate commerce. And Appellees have not even succeeded in advancing any reasons of expediency to justify the unconstitutional burdens thus imposed. Obviously, the fact that the Florida Statutes require the producer price to be fixed at such a level as to allow producers a fair rate of return does not, as Appellees seem to suggest (Brief of Appellees, Pages 5-7) justify discriminatory allocation. The Commission's remedy in this situation is to raise the producer price — not to seize all of the Class I sales for local producers.

A reading of Appellees' Brief therefore justifies the concluding comment that what is before this Court is nothing more nor less than a scheme intended to promote the economic interests of Florida producers at the expense of out-of-state producers whose milk must be shipped into Florida in interstate commerce. This is exactly the kind of favoritism by a state on behalf of its own citizens which the Commerce Clause was designed to forbid, to the end that the economic welfare of the people as a whole would be promoted by an untrammeled flow of commerce between all the states.

II. FLORIDA CANNOT ENFORCE HER MINIMUM PRODUCER PRICE REGULATIONS AS RESPECTS MILK SOLD TO MILITARY INSTALLATIONS, BECAUSE TO DO SO WOULD VIOLATE THE FEDERAL PROCUREMENT POLICY.

This Court, in the case of **Paul v. United States, 9 L. ed. 2d 292, 83 S. Ct. Rep. 426,** held that because of the Federal procurement policy, which demands that the fullest competition be had in bidding on Federal contracts, a State may not, by the enforcement of price regulations, eliminate competitors from bidding on government contracts.

The Court said:

> "While the federal procurement policy demands competition, the California policy, as respects milk, effectively eliminates competition. The California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States by having a state officer fix the price on the basis of factors not specified in the federal law. * * * * The collision between the federal policy of negotiated prices and the state policy of regulated prices is as

> clear and acute here as was the conflict between federal negotiated rates and state regulated rates in Public Utilities Com. of California v. United States, 355 U.S. 534, 2 L.ed. 470, 78 S.Ct. 446, supra."

The question of the effect of the Federal procurement policy upon State regulated milk producer prices has not been squarely presented to this Court, but the matter arose in the case of **U. S. v. Warne, 190 F. Supp. 645**, which was the lower Court decision preceding **Paul v. United States.** Following the **Warne** decision, and prior to the time this Court granted certiorari to the **Paul** case, the government abandoned its attack upon California minimum producer prices. However, in a dissenting opinion in **Paul v. United States**, this proposition was considered by three members of this Court, who observed that the mere fact that the government changed its position and abandoned its attack on producers' prices was only a matter of governmental discretion. In his dissent, Mr. Justice Stewart remarked that:

> "... and it can hardly be contended that scheme of producer price maintenance would be any less in conflict with the Court's view of Federal procurement policy."

The remarks of the Justice would seem most pertinent to this question.

It is clear that by requiring Polar to pay no less than 61c a gallon for any milk purchased from a Florida producer for use in supplying a military contract, Polar's position as a competitor in bidding on government contracts is seriously impaired. Certainly, it would be of great advantage to Polar to utilize milk from Florida producers in the fulfillment of military contracts. Contracts with military installations de-

mand a large and constant supply of fresh raw milk, a supply which Polar would find most readily available from its nearby Florida producers. It is seen at once, however, that Polar cannot use Florida milk to fulfill a government contract when the winning bid for processed, packaged and delivered milk is considerably below the price Polar is required to pay the Florida producers for raw milk.

Another obvious interference with Federal procurement policy is the attempt by the State of Florida to enforce her distributor's privilege tax on milk sold to military installations situate on property, exclusive jurisdiction to which has been ceded to the United States. Although this particular proposition will be considered in more detail hereafter in this brief, it is seen at once that if Polar is required to process milk brought in from out-of-state (or even milk purchased from Florida producers) through the facilities of its plant in Florida, it must pay 15c per 100 gallons in distributorship taxes. This expenditure must be taken into account on its bids for government contracts and it is seen that its bidding position is necessarily affected in a manner prohibited by the doctrine of **Paul v. United States.**

III. FLORIDA CANNOT ENFORCE HER DISTRIBUTOR'S PRIVILEGE TAX ON SALES TO MILITARY INSTALLATIONS LOCATED ON PROPERTY TO WHICH EXCLUSIVE JURISDICTION HAS BEEN CEDED TO THE UNITED STATES.

In reply to the arguments of Appellees on the issue of the right of the State of Florida to enforce a distributor's privilege tax upon Polar, as respects milk sold to military installations of the United States, Polar submits that Appellees have failed to meet the issue. The question is not as Appellees' Brief indicates,

whether the State of Florida, by the collection of fees, can finance the inspection and regulation of Florida's milk industry. The question, rather, is whether sales and delivery of milk at military installations which are under the exclusive jurisdiction of the United States are to be included in fixing the tax to be paid by the milk distributor under §501.09 of **Florida Statutes.** As pointed out in Brief for Polar Ice Cream & Creamery Company (page 43), the case of **Standard Oil Company** v. **California, 291 U.S. 242, 78 L.ed. 775,** is clearly on point. Although in the **Standard Oil** case, the product being distributed was gasoline, whereas in the case at hand the product is milk, the law remains the same. A state does not have jurisdiction to impose taxes upon transactions conducted beyond its territorial boundaries. It cannot be denied that Polar's sales of milk to United States military installations were transacted on property over which the United States has exclusive jurisdiction. Neither can it be denied that the inclusion of these sales in fixing the amount of the tax to be paid to the State of Florida represents a tax on sales made to the United States.

A further objection to the imposition of the distributorship tax upon Polar is its effect upon Polar's position as a competitor for milk supply contracts awarded by the United States. As mentioned in this Reply Brief, (Page 8) the Federal procurement policy prohibits a State from enforcing regulations which have the effect of eliminating competitors from bidding on government procurement contracts. A distributor, such as Polar, which is required to pay the Florida tax of 15c per 100 gallons of milk processed for a Federal military installation cannot enjoy the same competitive position as out-of-state distributors which are not subject to this burdensome tax.

The three cases cited in the Brief of Appellees are not applicable to the case at hand. The case of **Pure**

Oil Company v. State of Minnesota, 248 U.S. 158, 63 L.ed. 181, and the case of Texas Company v. Brown, 258 U.S. 446, 67 L.ed. 721, (cited at Page 26 of the Brief of Appellees), do not involve the sale of any product to the United States, nor do they involve any sale consummated on property over which the United States has exclusive jurisdiction. The absence of these factors makes these cases clearly distinguishable from the case at hand.

The case of U. S. v. Lee, 13 So.2d 919, cited by Appellees, cannot be applicable to any decision in the case at hand. The facts of the Lee case fail to show that any sale was consummated on property over which the United States had exclusive jurisdiction.

CONCLUSION

Florida's milk regulatory scheme creates an economic barrier in violation of the Commerce Clause of the Constitution of the United States, and the fixing of minimum producer's prices for milk sold to Military installations, exclusive jurisdiction to which has been ceded to the United States, violates the Supremacy Clause of the Constitution, as does the attempt to levy a Florida State distributor's tax on the sale of such milk.

For the foregoing reasons, the Judgment of the District Court should be reversed with directions to enter a Decree granting appropriate relief to the Appellant.

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PROOF OF SERVICE

I, JOE J. HARRELL, one of the attorneys for POLAR ICE CREAM & CREAMERY COMPANY, Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of October, 1963, I served a copy of the foregoing Brief on the several parties hereto by mailing a copy in a duly addressed envelope, airmail, postage prepaid, to their respective attorneys of record as follows: RICHARD W. ERVIN, Attorney General, State of Florida, Tallahassee, Florida, and JOSEPH C. JACOBS, Assistant Attorney General, State of Florida, Tallahassee, Florida, MALLORY E. HORNE, of Horne & Rhodes, 102½ South Monroe Street, Tallahassee, Florida, Attorneys for Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert C. Carter, Mrs. Charlotte Tomlinson, John H. Cone, and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida, and JOHNSON S. SAVARY, ESQ., Inverness, Florida, Attorney for Appellant.

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